

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BRAIDWOOD MANAGEMENT, INC., *et al.*,

Plaintiffs,

v.

Civil Action No. 4:20-cv-00283-O

XAVIER BECERRA, *et al.*,

Defendants.

DECLARATION OF ASSISTANT SECRETARY LISA M. GOMEZ

I, LISA M. GOMEZ, make this declaration, under the penalty of perjury, in support of a stay while this matter is under appeal.

1. I am the Assistant Secretary for Employee Benefits Security with the United States Department of Labor ("Department"). In the course of my official duties, I have knowledge of the facts set forth in this declaration and I am competent to testify to the facts set forth herein.

2. An estimated 133 million Americans have health coverage through 2.5 million Employee Retirement Income Security Act (ERISA)-covered health plans, including both participants (i.e., employees covered under the group health plan) and their beneficiaries..¹ The

¹ There were an estimated 133 million participants and beneficiaries covered by ERISA health plans in CY2020 that could be subject to the Affordable Care Act (ACA) preventive care requirements. An additional 75 million individuals were covered by public-sector employer sponsored health insurance or other private health insurance—which includes individuals who have coverage that is subject to these requirements. Source: Employee Benefits Security Administration (EBSA) estimates based on the Health Insurance Coverage Bulletin: Abstract of Auxiliary Data for the March 2021 Annual Social and Economic Supplement to the Current

Department estimates that there are approximately 200,000 large group health plans covered by ERISA, and 2.3 million ERISA-covered small group health plans, with an estimated 49 million participants in large group plans and 13 million participants in small group plans..²

3. In the absence of a stay, a significant number of Americans who are covered by an ERISA health plan face the threat of losing access to the cost-free preventive care coverage required pursuant to an “A” or “B” recommendation by the USPSTF on or after March 23, 2010. The recommendations made by the USPSTF on or after March 23, 2010—which ERISA plans would no longer be required to cover unless a stay is imposed—touch on virtually every aspect of patient health, including HIV Prophylaxis (PrEP), Hepatitis C screenings, and lung cancer screenings.

4. As a result of the court’s judgment, plans are now generally free, subject to any state laws that may apply to the underlying insurance coverage or contractual provisions, to add cost-sharing requirements for or drop coverage altogether for preventive care recommended by the USPSTF on or after March 23, 2010. Plans could make such coverage changes in the middle of a plan or policy year and, as a result, plan participants could lose broad coverage for certain preventive care services immediately. Plans are also generally free to make these preventive care coverage changes at the start of the next plan/policy year, and thus plan participants could lose such coverage at any point over the next 12 months.

Population Survey (August 2022), <https://perma.cc/VAR7-TGUA>. Note that these estimates for individuals in ERISA health plans, public-sector employer sponsored health insurance, and other private health insurance include individuals in grandfathered plans that are exempt from the ACA preventive care requirements.

² EBSA estimates based on the 2021 MEPS-IC and Census of Business Data https://meps.ahrq.gov/data_stats/summ_tables/insr/national/series_1/2021/ic21_ia_g.pdf

5. While some plans may continue providing all of the cost-free preventive care coverage, it is likely that a material number of plans will elect to drop coverage for the preventive services at issue, either in the middle of a plan year or (more likely) at the start of the next plan year, or at a minimum elect to begin imposing cost sharing for such services. Based on available data, EBSA anticipates that a number of plans will start new plan/policy years before January 1, 2024. For example, of the roughly 73,000 plans that submitted annual reporting forms to EBSA for plan year 2020, more than one-third (35.7 percent) covering 14.2 million participants had plan years that ended between April 30 and December 30. That includes 22.3 percent of plans (representing 6.3 million participants) that had plan years that ended between April 30 and June 30.³

6. As the Departments' 2015 Final Rules on preventive services explained, historically, health insurance issuers have had little incentive to cover preventive services, the benefits of which may only be realized in the future when an individual may no longer be enrolled with that issuer.⁴ We expect that such is also often the case with group health plans. This has been borne out by the implementation of preventive care mandates based on USPSTF recommendations. For example, according to a report by the American College of Radiology, a large number of plans adopted cost-free coverage for lung-cancer screenings only after the USPSTF gave such

³ Source: 2020 Form 5500 filings. Of the estimated 2.5 million ERISA health plans, only 73,125 filed Form 5500s for plan year 2020. This is largely due to a filing exemption for health plans (other than plans required to file the Form M-1) with fewer than 100 participants as of the beginning of the plan year (small plans) that are unfunded, fully insured, or a combination of insured and unfunded. As such, the distribution of plan ending periods reported here is not necessarily representative of the larger ERISA universe.

⁴ 80 Fed. Reg. 41318, 41330-31 (July 14, 2015).

screenings a B rating in March of 2021.⁵ The Department therefore expects that many plans would not provide cost-free coverage in the absence of a requirement.

7. A loss of coverage for cost-free preventive care would have a substantial negative impact on the health and well-being of plan participants and beneficiaries. Data has shown that without cost-free services, Americans are less inclined to access lifesaving and cost-saving preventive services. For example, as the Department explained in the preamble to the 2015 Final Rules on preventive services, a number of factors prevent widespread use of preventive services, including costs, ethnic/gender disparities,⁶ and a general lack of knowledge as to the benefits of preventive services.⁷ In addition, many preventive services generate benefits that do not accrue immediately to the individual that receives the services, making the individual less likely to avail themselves of the services, especially in the face of direct, immediate costs. Furthermore, some of the benefits of preventive services accrue to society as a whole and thus are not factored into an individual's decision-making over whether to obtain such services. In sum, the elimination of coverage for these services, or the imposition of cost-sharing for their use, will cause fewer Americans to avail themselves of these services, leading to higher overall health care costs, a sicker population, and loss of life from conditions that could have been prevented. Ensuring that preventive care services are available on a cost-free basis is important to overcoming the barriers to accessing vital health care services.

⁵ American College of Radiology, *Status of Lung Cancer Screening Coverage (2022)*, <https://perma.cc/D688-TKUE>.

⁶ 80 Fed. Reg. at 41330 (citing Call, K. T., McAlpine, D. D., Garcia, C. M., Shippee, N., Beebe, T., Adeniyi, T. C., & Shippee, T. (2014). Barriers to Care in an Ethnically Diverse Publicly Insured Population. Medical Care).

⁷ 80 Fed. Reg. at 41330 (citing Reed, M. E., Graetz, I., Fung, V., Newhouse, J. P., & Hsu, J. (2012). In consumer-driven health plans, a majority of patients were unaware of free or low-cost preventive care. Health Affairs, 31(12), 2641–2648).

8. These problems would be exacerbated if the loss of these coverage requirements takes effect immediately. Absent a stay of the district court's judgment, if an appeal in this case is ultimately successful, providers and patients will be unnecessarily subjected to abrupt changes in the terms of coverage. Abrupt changes in preventive care coverage—particularly for services that have been covered for a decade or longer—is likely to lead to confusion among providers (with respect to what they recommend for their patients) and patients (with respect to the cost impact of such services).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on the 12th of April, 2023 in Washington, D.C.

/s/ Lisa M. Gomez Digitally signed by Lisa M. Gomez
Date: 2023.04.12 13:12:31 -04'00'
Assistant Secretary for
Employee Benefits Security
US Department of Labor